Central Law Journal.

ST. LOUIS, MO., NOVEMBER 27, 1908

THE FAILURE OF AMERICAN CRIMINAL LAW.

America is at a decided disadvantage in contrast with England in the matter of the prompt and efficient administration of the criminal law. Unreasonable delays and miscarriages of justice based on the merest technicality have in recent years become the subject of much public animadversion.

In recent editorials we have called attention to the insidious encroachments of mob vengeance, creating a new order of executors of the law *de son tort* unknown to any system of jurisprudence, such as lynchers, white-cappers, black-handers, night-riders, etc. We have called attention to the causes and have suggested remedies. Hitherto, however, our suggestions have been addressed to every department of organized society except the courts. Now, for them; and the Lord have mercy on them, for they have been very guilty. We shall not shield them, while we have condemned every other contributing cause to this lamentable national calamity.

The most frequent charge made against the judicial administration is its interminable delays. On November 18, 1908, Attorney General Bonaparte in an address before the National Municipal League, speaking of some of the failures of American criminal law, said: "Why need there be a foretaste of eternity between arrest and indictment, another between indictment and trial, and yet another between trial and actual punishment?" This he answered by declaring that it is "partly because the bench and the professional opinion among the bar tolerate all kinds of dilatory, frivolous and often ridiculous proceedings on the part of unscrupulous counsel, intended to cheat justice of her plain due; partly because our law-makers afford almost infinite facilities for review of judicial action to the criminal, although being very stingy in allowing them to the government; but mainly because laws show little sense of the value to society of a speedy administration of justice." Again at the close of his address he gave what he considered the principal cause of the failure of American criminal law. He said: "I think American criminal law today has very serious defects, and in a large measure fails of its purpose. A principal cause of this failure, to my mind, is its anxiety to guard against a danger which was once very serious, but which has now become almost chimerical, the danger lest men really innocent be convicted of crime."

The next serious indictment against the courts in their administration of criminal law is their inevitable inclination to reverse a case on the appearance of any technical error in the record, or in the admission or exclusion of evidence, without pursuing the further inquiry, whether such error materially affected the result or even whether it had any bearing whatever on the result. We are as jealous as anyone possibly could be, within reason, of the due and orderly administration of justice. Exact justice often depends on insistence upon those proper forms of pleadings and compliance with those general rules regulating the admission and exclusion of evidence that have come down to us through the experience of the ages that have gone before us. But many changes and modifications in some of these rules have become necessary to meet modern conditions; and, moreover, a new rule, clearly in support of the prompt administration of the law, requires a substantial rather than a technical compliance with all such rules and regulations. Courts who fail to give full force to this modern rule of construction in criminal causes and persistently cling to a rigid insistence upon unnecessary technical requirements will be forced to meet the contempt of the people, and the open resistance of men smarting under some outrage and unable to control the unlawful expression of their pent up feelings.

Almost every appellate court in the land has been guilty. We shall shield none of them, however, and shall consider it a favor if members of the bar will call our attention to recent utterances of their appellate tribunals, who in insisting upon some immaterial error, have outraged public opinion and thwarted the diligent efforts of the state in bringing some guilty offender to justice. For it must be remembered that justice is not always on the side of the accused. It is the grossest possible injustice to the law-abiding citizens of any community to throw back upon them a criminal whose difficult and hard-fought conviction on the first trial is overturned because of the most trifling error, and rendered more difficult of attainment on the second trial for many obvious reasons.

Taking the Missouri Supreme Court as an instance, we call attention to the recent case of State v. Campbell, 210 Mo. 202, where that court held that the absence of the word "the" before the word "state" in the clause "against the peace and dignity of the state," rendered the indictment absolutely void and reversed and remanded the case for a new trial. The case involved the crime of "rape," which next to murder most wildly arouses the public indignation. It does not take a philosopher to determine the effect of such a decision upon the community whose sense of justice and right has been outraged by the commission of such a crime. Lawyers may follow with something of interest the fine spun argument of the court as to the substantial significance of the article "the," which in some languages, as the Latin, is so tremendously important as not to have even an equivalent, but the general public, and even that class among them who are inclined to be thoughtful, and to think soberly, will regard the distinction sought to be made as the merest sophistry and as trifling with the sacred rights of the people.

Missouri is not alone in insisting upon this technicality. In West Virginia the appellate court decided that the abbreviation of "West Virginia" to "W. Virginia" invalidated the indictment. Lemons v. State, 4 W. Va. 755. The people of that state promptly rebuked this very technical construction by amending the constitution by striking out the words "of West Virginia," leaving the form to conclude as it does in Missouri and other states. In Arkansas, on the other hand, which requires the clause, "against the peace and dignity of the people of the State of Arkansas," it was held that the omission of the words "the people of" would not invalidate the indictment. Anderson v. State, 5 Ark. 444.

But without discussing the merits of this technical requirement or delicately indicating the weight of authority, we are prepared to say that the discussion is wholly anachronous; it belongs to the days of Queen Elizabeth when both the bench and bar split hairs with a precision that puts to shame our modern imitators, while justice wept unnoticed and unheeded without the gate. The people do not want a return of those days of technical hair-splitting, but have decreed by unmistakable indications that while courts shall construe the law strictly according to its tenor and effect, a substantial compliance therewith is sufficient without regard to the strict letter thereof. Unless courts are prepared fully to give effect to this modern rule of construction, especially in criminal cases, a large share of the responsibility for the spread of mob law and the individual and communistic enforcement of the criminal law, will be laid at their doors.

NOTES OF IMPORTANT DECISIONS

THEATERS AND SHOWS—LIABILITY OF MANAGEMENT FOR INJURY TO SPECTATOR UNDER IMPLIED CONTRACT AS TO SAFETY.—The management of a circus, theater, base ball or foot ball exhibition and every other kind of public exhibitions are not always fully advised as to the extent of the liability imposed upon them in regard to the safety of spectators whom they invite to their

performances. In the recent case of Scott v. University of Michigan Athletic Assn., 116 N. W. 624, it was held that it is not enough to release an athletic association from liability for injury from collapse of a spectators' stand built by it, to a spectator who pays for the privilege of being on it, that the stand was erected by a competent and experienced builder, of good materials, and before use was inspected and pronounced safe by engineers and others competent to perform the work of inspection; but it impliedly contracts that except for unknown defects, not discoverable by reasonable means, the stand is safe. The court said: "The testimony goes much beyond proving merely an accident and resulting injury. That relied upon to show that defendants exercised due care tends to prove that the stand was erected by a competent and experienced builder, of good materials; that before it was used it was inspected by engineers and others admittedly competent to perform the work of inspection, who pronounced it safe. It is clear, however, that a wholly inadequate structure was in fact tendered for public use, and it cannot be determined, upon this record, as matter of law, that a latent and not a patent defect, discoverable in the exercise of proper care, existed. The managers of the grounds and stands occupied upon the occasion in question the position of proprietors of a public resort. Plaintiff was not a mere licensee, and did not occupy the stand by mere invitation. Whether responsibility to the plaintiff is grounded, in the form of action instituted, upon a contract or upon a duty, it exists, if at all, because of an implied contract. The implied contract was that the stand was reasonably fit and proper for the use to which it was put. The duty was to see to it that it was in a fit and proper condition for such use. Neither plaintiff nor the public generally would be expected to examine the stand and judge of its safety. This consideration, and the probable consequences of failure of the structure, imposed upon the responsible and profiting persons the duty of exercising a high degree of care to prevent disaster. They were not insurers of safety. They did not contract that there were no unknown defects not discoverable by the use of reasonable means, but having constructed the stand, they did contract that except for such defects it was safe. 1 Thomp. Neg. §§ 994-997; 21 Am. & Eng. Ency. Law, 472; Francis v. Cockrell, 5 L. R. Q. B. 184; s. c. 39 L. J. Rep. (N. S.) Q. B. 113, 39 L. J. Rep. (N. S.) C. L. 291. See also, Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788; Id. 163 N. Y. 559, 57 N. E. 1109."

PROPERTY IN RUNNING AND FALLING WATER.

The most thorough going lawyer would hardly deem it necessary to go back to the "design" of the Creator to determine a property right *in praesenti*. Nevertheless even in this twentieth century, judges sometimes indulge in references to "natural law" and "natural right" and to "the law of God." Whether from a consciousness that their own decisions may not always square with the ideas suggested by these phrases, or that the one in hand is in need of a better foundation and support than that afforded by mere precedent or judge made law, we will not presume to determine. There are skeptics, in any case who will be disposed to doubt that even an unprecedented judicial decision, is likely to be much inferior "in wisdom and justice," to what are set forth as the decrees of the Almighty by a philosopher, who perhaps more than any other in America is responsible for the present movement of society towards socialism. In the first chapter of the seventh book of "Progress and Poverty," Mr. Henry George declares that: "The Almighty who created the earth for man and man for the earth, has entailed it upon all the generations of the children of men by a decree written upon the constitution of things—a decree which no human action can bar and no prescription determine." And from this decree, which Mr. George ascribes to the Almighty, it follows, that—"Though his titles have been acquiesced in by generation after generation, to the landed estates of the Duke of Westminster, the poorest child that is born in London today has as much right as his eldest son. Though the sovereign people of the state of New York, consent to the landed possessions of the Astors, the puniest infant that comes wailing into the world, in the squalidest room of the most miserable tenement house, becomes at that moment seized of an equal right with the millionaires. And it is robbed if the right is denied."[1] "Landowners can make no just claim to com-

(1) p. 240.

pensation if society choose to resume its right."[2]

Huxley's criticism of these high-sounding phrases will not by many lawyers be deemed too severe. In his collection of essays, entitled, "Method and Results," page 379, he says: "Who would not be proud to be able to orate in this fashion? Whose heart would not beat high at the tempest of cheers which follow stirring words like these addressed to needy and ignorant men? How would the impassioned speaker's ear be able to catch a tone as of the howl of hungry wolves among the cheers? Why should he care that his stirring words might stir up the plain enough conclusion: Well, if these things are all ours as much as theirs, and we are the stronger, why do we not take our own, and that at once? What harm in robbing robbers?....According to Mr. George, that deed of entail, which he should have somewhere in his office, confers the land upon 'all the generations of the children of men.' Hence it follows that the London infant has no more title to the Duke of Westminster's land, and the New York baby no more to Messrs. Astor's land, than the child of a North American squaw, of a native Australian, or of a Hottentot. Property of the community forsooth. What right has any community, from a village to a nation to several property in land more than an individual man has?

Natural justice can recognize no right in one (body of men) to the possession and enjoyment of land, that is not equally the right of all (their) fellows. (p. 240.)

Does it make any difference to the validity of this proposition, if I substitute the words in italics for the actual words 'man' and 'his'? So the splendid prospect held out to the poor and needy is a mere rhetorical mirage; and they have been cheated out of their cheers by mere 'bunkum.' Consider the effect of a sober and truthful statement of what the orating person really meant, or, according to his own principles ought to mean; say of such a speech as this:

My free and equal fellow countrymen, there is not the slightest doubt that not only the Duke of Westminster and the Messrs. Astor, but everybody who holds land from the area of a thousand square miles, to that of a table cloth, and who against all equity, denies that every pauper child has an equal right to it is a robber. (Loud and continued cheers, the audience, especially the paupers, standing up and waving hats). But my friends I am also bound to tell you that neither the pauper child, nor Messrs. Astor, nor the Duke of Westminster, have any more right to the land than the first nigger you may meet, or the Esquimaux at the north end of this great continent, or the Fuegians at the south end of it. Therefore before you proceed to use your strength in claiming your rights and take the land away from these usurping dukes and robbing Astors, you must recollect that you will have to go shares in the produce of the operation with the four hundred and odd millions of Chinamen, the hundred and fifty millions that inhabit Hindostan, the——(loud and long continued hisses; the audience, especially the paupers, standing up and projecting handy movables at the orator.")

But while the principle which Mr. George enunciates as a decree of the Almighty is wholly unsound when applied to land, it is not without force when applied to water. In fact some of his arguments against private ownership in land, become truisms when used against private ownership in water. So manifest is it that the great waters of the globe have been, (to use the rhetoric of Mr. George "entailed upon all the generations of the children of men by a decree written upon the constitution of things," that neither private nor national ownership has ever been asserted to the great oceans of the earth.[3] And with respect to shore waters, and the waters of navigable lakes and rivers while they have

(2) "Progress and Poverty," Preface. p. vii.

(3) The poets of England have recognized her as "mistress of the seas," and it must be remembered too, that her sovereigns asserted supremacy over the small seas immediately surrounding her, and this supremacy seems to have been acknowledged in a measure by the neighboring monarchs. See note to Goff v. Bougle, 42 L. R. A. 161, where the annotator cites Selden's Mare Clausum, b. 2, ch. 30.

been the subject of national ownership yet their use as highways of commerce and travel, in modern days at least, is almost as free to strangers as to their owners. Thus the common rights of each and all to the waters of the earth is acknowledged in practice, and no one need take the trouble to prove it after the manner of the deductive philosopher; for even if private ownership had been decreed by the Almighty and allotments made, requiring only the occupancy of the elect, for the perfectionment of their titles, the condition would probably have still remained unperformed. Title by occupancy of navigable waters is a naked title, which no one is likely to take advantage of. It would require more than the present piscatorial propensities of mankind, to lead them to dispute possession with Neptune and his dolphins, for,

"Who would be
A mermaid fair,
Singing alone,
Combing her hair,
Underneath the sea?"

Obedience to the first law of nature will no doubt continue to be universally displayed so far as obedience consists in each refraining from jostling his fellows in his efforts to secure a habitation in Neptune's domains. And to this end natural law will doubtless continue to be abundantly sufficient and no one will need to invoke the aid of mere man made law.

Water a Gratuitous Offering of Nature.—It is no part of the purpose of this article to argue that where private ownership in water has been sanctioned by law, the title of the owner should be held any less sacred than his title to any other species of property. Water, like land and every other element of the physical universe, is, in the language of Mr. George, a gratuitous offering of nature, in the sense that man has had nothing to do with its creation. But the conclusion which Mr. George draws that for that reason land should not be made the subject of private ownership, is as Professor Huxley very clearly showed wholly unwarranted. That water has for the most part been recognized as the common property of mankind, results from a very different reason than that it is "a gratuitous offering of nature." It is common property as a highway of trade and travel, because, so far as the great oceans are concerned, these are practically the only artificial uses to which it can be put, and as a highway, it is of breadth sufficient to serve all comers. It is common property in the great seas for the same reason that light and air are common property. They cannot be appropriated so as to be made the subject of private property, for the source that supplies one is amply sufficient to supply all gratuitously. These "gratuitous offerings of nature" are shared by mankind in common, not because man has had no share in producing them, but because they have been produced in such abundance. Assuming that the mysteries of nature were known to some one individual and that all power over light, air and water, were given to him in the earth, so far as production is concerned, his products would cease to command a price when production had reached the magnitude attained by nature, wholly irrespective of the amount of labor expended in their production. The circumstance of its abundance, and the fact that it is so well fitted to serve man as a highway are clearly the chief reasons why water has been reserved for public uses. It must be remembered that a portion of the land of all civilized countries has also been reserved for public use. Had nature given us the public roads as they now exist, they would doubtless have been utilized as highways of travel, and reserved by the government for that purpose, not however for the reason that they would have been "gratuitous offerings of nature," but because of their fitness to serve as means of travel, and for the further reason that their sandy and gravelly composition would have rendered them unfit for any other purpose. But

Our Inquiry is With Reference to the Fact Rather than the Policy of Public Ownership of Water Power.—Still the expediency of a policy has sometimes an important bearing upon the question: What in fact is the law? Considerations as to what

the law ought to be, sometimes aid in determining what the law is. For example, if an individual should assert exclusive ownership to a portion of a sandy, gravelly highway after it had been surveyed, marked off and dedicated to the public on the ground that he owned the land abutting on both sides of it and that his deeds made no allowance for the highway, but purported to give him the title to the whole; the court if it deemed that the policy of the law had not theretofore been sufficiently expounded, might proceed to a categorical statement, as to what the rights of the individual and the public ought to be under such circumstances. But we do not propose to undertake a detailed statement, or to enter upon an extended investigation of—

The Public Uses of Water Power.—In a former article,[4] we pointed out that from the earliest colonial period in the New England settlements, especially in Massachusetts, mills run by water power were regarded as having a peculiar status. While the taking of the land and the water power necessary for a mill site was usually placed upon the ground that the development of manufacturing was thereby achieved, and the material interests of the whole state advanced,[5] and that this made the taking a taking for public uses, yet there was usually, a tacit, if not an express recognition of a private interest in the water power taken. Of course the taking of a mill site, would involve the taking of the riparian owner's upland as well as the land under water,[6] and hence the owner in such cases would be entitled to some remuneration for he would be entitled to compensation for the upland, there being no question as to the private character of the title to it, whatever the nature of his interest in the water or in the land under the water. In such cases there would be no necessity for determining the latter, and we have found no case where it has been expressly determined. Probably the mill sites were usually upon streams non-navigable for some of the acts at least were expressly confined to non-navigable streams,[7] and they throw little light upon the character of the riparian owner's title to water power upon navigable streams, but they do show that the use to which the water power was applied (viz. manufacturing), was universally regarded as a public use in the states where the acts were sustained.[8] We have seen too, that the courts regard water power as being put to a public use when used in developing electricity for lighting purposes, and indeed for any business controlled and regulated by the state.[9]

This broad doctrine will probably be limited to businesses which, by reason of natural or artificial conditions have become peculiarly subject to monopoly.[10] Of such businesses, railroading is a good example, and the electrification of railroads is not only being considered by practical railroad men, but some of the companies have already adopted electricity for certain portions of their roads. In cities the smoke and soot from the chimneys of manufacturing establishments have long been regarded as a nuisance, and the abatement of a public nuisance is as much a public service as the operation of a street railway. To this end it would undoubtedly be within the governmental power of the states and nation to compel where practicable the substitution of electricity for coal. And although the reasoning may seem somewhat

(4) 67 Cent. L. J. 356.

(5) Ryerson v. Brown, 35 Mich. 332.

(6) Harding v. Goodlet, 3 Yerg. 41; 24 Am. Dec. 546.

(7) See note to Head v. Amoskeag Mfg. Co., 113 U. S 9, 28 L. Ed. 889, where one of the New Hampshire acts is quoted in full.

(8) See cases cited in Art. 67 Cent. L. J. 356.

(9) See Art. 67 Cent. L. J. 356, and cases cited.

(10) In Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, it was said that in England, from time immemorial, and in this country from its first colonization, it was customary to regulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers and many other matters of like nature. There is no doubt but that the present tendency is toward an extension of government regulation. Much of the regulation, of course, proceeds upon the theory not that the business is of a public character, but that as in the case of the liquor traffic, its regulation is necessary as a police measure for the safeguarding of society from evils likely to arise from and incidental to the business.

far fetched it is at least worthy of consideration whether water power applied to the generation of electricity may not be regarded as used in a public service when electricity is the most convenient means at hand, for getting rid of the smoke nuisance.[11] Again, the telegraph and the telephone have long been regarded as public agencies and their operation is undoubtedly a public use. So, with wireless telegraphy, whose messages encircling the globe, not like the "martial strains" immortalized by Daniel Webster, but like the "still small voice" bearing promises of peace and good will to all who will take the trouble to listen with the proper receiving medium attuned to receive them.

Public Use of Property in Private Hands —Labor as the Basis of Title to Property. —That an agency is capable of being applied to a public use, does not argue that it may not also be the subject of private property. It is of course an important consideration in determining the attitude of government towards it. If it were the only agency capable of serving a great public end, it would become the duty of government to apply it to that end, although that might involve the taking of it from the hands of private owners, but it could only be so taken, under our constitutions, both state and national, upon just compensation being rendered therefor. But, of course, the public end might be as well served, and indeed better served by allowing the agency to remain as private property devoted to public uses under government regulation, than it could be if taken over absolutely by the government. Such is the present policy of the government towards the railroads of the country, and in a measure also toward the canals. Many of the latter although originally constructed either by the states or by private corporations, have been purchased by the federal government. The power of congress in this connection is limited only by the necessities of commerce, or rather by what the Supreme Court may regard as a necessary regulation of commerce.[12] There is no doubt but that, if deemed essential for this purpose, all the water powers in the country might be taken over by the federal government. It is a question of expediency, not a question of constitutional limitation. As was said by Mr. Justice Waite with reference to the regulation of the electric telegraph: "Since the case of Gibbons v. Ogden, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of congress, because being national in their operation, they should be under the protecting care of the national government.

"The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider, to the stage coach, from the sailing vessel to the steam boat, from the coach and the steam boat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances....

"The electric telegraph maks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business and become one of the necessities of commerce."

But our inquiry now is, whether the natural water powers of the country are not already public property. The public uses to which they may be put may by the court be regarded as having an important

(11) Such regulation as might be necessary to get rid of a nuisance to the public would be but a very ordinary exercise of the police power. For a discussion of the fundamental principles involved, see the following cases: Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Calder v. Bull, 3 Dall. 386; 1 L. Ed. 648; Sturgis v. Crowinshield, 4 Wheat. 122, 4 L. Ed. 529; U. S. v. Rio Grande Dam & Irrig. Co., 174 U. S. 703, 43 L. Ed. 1141; Handy v. Globe Co., 4 L. R. A. 466, 41 Minn. 188, 42 N. W. 872.

(12) Pensacola Tel. Co. v. West. Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708.

bearing upon the question of their ownership, as may also the fact that they are "gratuitous offerings of nature," the hand of man having had no part in their formation. Henry George and his disciples regard labor as the ethical basis of all title to property, and in favor of this view much can be said, even from the legal standpoint. For if a man asserts title to property worth in the markets of today millions of dollars, although worth nothing when he became the owner of the land to which he claims it is appurtenant, the law will hold him to strict proof of his claim, particularly, where as in the case of water power, his labor has added nothing to its value. But while the expenditure of labor in producing affords an ethical basis of title to that which is produced, it would not alone be sufficient basis for a legal title. For example; the owner of land abutting upon a waterfall might go to great expense in applying the force of the falling water, to some useful purpose, and yet the fact that he had expended labor and money would not of itself give him title to the water power although without his labor it would have been running uselessly in the stream. That many of the natural water powers of the country have been developed is not of itself any assurance that the law will recognize the claim of those who have developed it to be the legal owners. If this should prove to be the situation of any who have developed water powers, they will be in no worse condition than thousands who have expended labor upon farms, or mining property the titles to which were defective. The expenditure of labor is no absolute test either in law or in morals of the rights of him who has expended it. A. would not be justified in retaining B.'s farm, because of the improvements he had put upon it. Nor would the improver of water power be justified in withholding the water power from the state if the state can show a superior title. The law usually takes into consideration all facts that would have a bearing on the issue from the moral standpoint. It does not decide questions solely upon abstract principles in any case. From the principle that labor is the only valid basis for title to property Mr. George deduces the conclusion that there should be no private property in land, and if this principle be interpreted to mean that whatever nature bestows, is bestowed on all and is essentially the common property of all, his conclusion is sound, or rather, logical; and if the courts proceeded on this principle, they would undoubtedly hold that natural water powers are public property. But on the same principle they would be obliged to hold that all property is public property, for whatever form it finally assumes, it was originally a mere "gratuitous offering of nature." While in the delicately fashioned instruments of science, we see small resemblance to the original offering of nature in the form of iron deposited in the rocks yet these instruments contain absolutely nothing that did not come from nature's hands. Labor may change the form, but it cannot change the substance. To nature we owe every jot and tittle of personal property in exactly the same sense that to her we are indebted for land. It is true that from the open prairie to the cultivated farm there is not so great a transition as from the mine to the factory, but to utilize nature's offering in either case there must be labor expended. If the processes involved in production justify private property in manufactured articles, so also do the processes involved in transforming land in its natural state into a cultivated farm, justify private property in land, and so also the labor in developing water power might be urged as supporting a claim of private ownership. Still in the case of water power it must be admitted that the claim of labor as a basis of title has less force than in the case of land or of manufactured products. For—

Water Power is Not Diminished by Use.—Perhaps for this reason it is said by Governor Deenan, to be inherently and necessarily public property. It is like the widow's cruse of oil and remains unimpaired although the numbers dependent upon it may be increased. Its power is the same whether it be made to drive one thousand or ten thousand turbines. It may indeed become impaired, not by use, but by

an unwise national policy which permits the destruction of the natural agents which regulate it. But if these natural agents are maintained the water powers of the country may be depended upon for a thousand years' continuous labor. By a proper national policy the language of the poet, may be true as a scientific statement:

> 'For men may come and men may go,
> But I go on forever."

W. A. COUTTS.

Sault Ste. Marie, Mich.

NEGLIGENCE—PLACES ATTRACTIVE TO CHILDREN.

MAYFIELD WATER & LIGHT CO. v. WEBB'S ADM'R.

Court of Appeals of Kentucky, June 20, 1908.

An electric wire, 18 feet above the ground, which could only be reached by climbing a pole or guy wires stretched from a pole to the ground at an angle of 45 degrees, was not a dangerous instrumentality attractive or alluring to children.

HOBSON, J.: The Mayfield Water & Light Company maintains a system of electric lights in Mayfield. It erected along College Cross street a line of poles 18 feet high, and at the top of the poles on a cross arm it placed two electric wires 20 inches apart and 18 feet from the ground. After this had been done, the Home Telephone Company put up a line of poles along the street 30 feet high, and on these poles it placed wire cables containing its telephone wires. At the intersection of Sixth street, the telephone poles turned in Sixth street, and to keep its pole straight at this point it attached two guy wires to the top of the pole and ran them out to a deadman, or log, buried in the ground; the guy wires running down from the top of the pole at an angle of about 45 degrees being about four feet apart at the ground and coming together at the top of the pole. The guy wires passed in about 8 inches of the electric wire. The children of the neighborhood would hold on to the upper guy wire with their hands and walk on the lower wire, and then slide down, using the wires to play upon. Charles M. Webb, a little boy 11 years old, was playing upon the wires in this way, when his head touched the electric wire, thus completing the circuit, and he was instantly killed. This suit was brought against both the electric light company and the telephone company to recover for his death. A recovery was had in the circuit court for $1,000, and the defendants appeal.

There was proof on the trial that the insulation on the electric light wire was defective, and there was also proof that, whatever the condition of the insulation might have been, the result would have been the same when the little boy's head touched it while he was standing on the other wire which ran into the ground; the proof being that the insulation will not protect from injury when such a high current of electricity is carried as was used on this wire. The ground upon which the recovery is rested is that in the construction of the wires they were made attractive and inviting to children, and that the defendants were guilty of negligence in so maintaining the wires and permitting them to remain in this dangerous and unprotected condition. This court has in a number of cases held electric light companies responsible where it permitted live wires to hang in the street. Thus, in City of Owensboro v. York's Adm'r, 117 Ky. 294, 77 S. W. 1130, a little boy 12 years old discovered that a wire was hot, and, being dared by one of his companions to touch it, got on a board, took it in his hands, and was killed. A judgment for the plaintiff was sustained. To same effect, see Macon v. Paducah Street Railway Co., 110 Ky. 680, 62 S. W. 496; Lexington Railroad Co. v. Fain's Arm'r, 71 S. W. 628, 24 Ky. Law Rep. 1443; Thomas v. City of Somerset, 97 S. W. 420, 7 L. R. A. (N. S.) 963, 30 Ky. Law Rep. 131; Maysville Gas Co. v. Thomas Adm'r, 21 Ky. Law Rep. 1690; Id., 75 S. W. 1129, 25 Ky. Law Rep. 403. But in all of these cases the wire was in the street. Here the wire was 18 feet above the street. It could only be reached by a person climbing the electric light pole or walking up the guy wire of the telephone company. In all the cases where a liability has been imposed for what is known as an attractive nuisance to children, the nuisance has been placed within their reach. We know of no case where this has been applied to things put 18 feet above the ground, which may only be reached by climbing a pole or walking up a wire. Such structures are not an invitation to children to use them. A child may climb a dead tree, and thus get hurt; but the owner of the tree cannot be said to maintain an attractive nuisance, because he keeps a rotten tree on his land. To climb this pole or walk this wire was as difficult as to climb a tree, and no reason would exist for holding one an attractive nuisance more than the other, for, if the limbs of the tree were brittle or rotten, there would be great danger in climbing out on

them. In Simonton v. Citizens' Electric Light Co., 28 Tex. Civ. App. 374, 67 S. W. 530, the defendant had placed spikes in its poles for the use of its men in ascending and descending them. Children in the neighborhood got to using the pole in the same way. One of them went up on the pole and lost his balance and fell to the ground. It was held that the company was not liable. The spikes on the side of the pole would offer a much greater inducement to a child to climb the pole than the guy wire offered in the case before us. In Johnson v. Paducah Laundry Co., 92 S. W. 330, 5 L. R. A. (N. S.) 733, 29 Ky. Law Rep. 59, the defendant had upon its open lot an open vat of hot water. The plaintiff walking upon the lot in the night for a purpose of his own and without right, fell into the vat of hot water and was burned. It was held that he could not recover. In Schauf's Adm'r v. City of Paducah, 106 Ky. 228, 50 S. W. 42, 90 Am. St. Rep. 220, a little boy wading out into an open pond on the property of the city to catch a bird got over his depth and was drowned. It was held that there could be no recovery. Other authorities are collected in these opinions. The tendency of the more recent cases is to restrict, rather than enlarge, the application of the principle laid down in what are called Turntable Cases, and to hold that the defendant is not liable unless he knows, or ought in the exercise of ordinary care to know, that his structure is alluring to children and endangers them. See note to Barnes v. Shreveport R. R. Co., 49 Am. St. Rep. 416-426. In Harris v. Cowles, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 847, a child was injured by a revolving door at the entrance to a building; the door being similar to those in common use in winter to keep out the cold. It was held that the trespasser, though a child of tender years, could not recover, on the ground that to extend the rule would be to impose a burden upon the property owners that would be unreasonable. The same principle was applied in Fitzmaurice v. Connecticut R. R. Co., 78 Conn. 406, 62 Atl. 620, 112 Am. St. Rep. 159, where a child was burned at a pile of hot ashes left upon the defendant's premises, and in Foster-Herbert v. Cut Stone Co., 115 Tenn. 688, 91 S. W. 199, 4 L. R. A. (N. S.) 804, 112 Am. St. Rep. 881, where a child climbed into a low wagon and was there hurt.

As long as electric light wires are not put under ground, they must be put upon poles, and, where they are placed above the street as high as 18 feet, the company should not be required to anticipate that children will climb up to the wires and get hurt. Guy wires are necessary on high poles at street corners where the line turns. A guy wire placed on a high pole to keep it in place, or some such contrivance, cannot well be dispensed with. Such a wire is not a dangerous instrumentality, attractive or alluring to children within the meaning of the Turntable Cases. The little boy was a trespasser upon the defendant's wire, and being a trespasser, he cannot complain that the premises were unsafe. Children, no less than adults, when they trespass upon the property of another, take the risk unless the circumstances bring the case within the principle of what is known as the Turntable Cases, where a dangerous instrumentality is maintained, with knowledge, actual or constructive, that it is alluring to children and endangers them. A wire 18 feet above the ground, which can only be reached as this wire was, cannot be said to fall within the exception to the general rule.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

NOTE.—*Liability of Owners of Dangerous Property Attractive to Children.*—The Turntable Cases, the first and foremost of which is Railroad Co. v. Stout, 17 Wall, (U. S.) 657, imposed an exception to the well recognized rule that a landowner is under no obligation to use care to protect a tresspasser, to-wit, that a landowner is liable for maintaining a dangerous article or contrivance on his premises which is attractive to children of tender years.

This doctrine has not been universally recognized by the courts and cannot be said to be a settled doctrine of the law. Indeed in view of the unsettled construction, we would not be surprised to find in a few years, the doctrine wholly discredited by the great weight of authority. Some of the most learned courts in the country have wholly repudiated the doctrine. Ryan v. Towar, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310; Mangan v. Atterton, L. R. 1 Exch. 239, 35 L. J. Exch. 161; McEachern v. Railroad Co., 150 Mass. 515; Walsh v. Railroad Co., 145 N. Y. 301, 45 Am. St. Rep. 615; Paolino v. McKendall, 24 R. I. 432, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133; Hughes v. Railroad, 71 N. H. 279, 51 Atl. 1070. Probably the best statement in opposition to the reasons announced as the basis of the Turntable Cases is that of Ryan v. Towar, supra. The court in that case extensively reviews the authorities and arrives at the result that the consensus of the best judicial opinion is opposed to the doctrine of the Turntable Cases and that "the courts and the profession have evinced a tendency to allow this innovation to go no further, and refuse to consider it applicable to other cases every way analogous. They speak of the cases generically, as the 'Turntable Cases,' and treat such cases as exceptional."

A review of the recent cases will show how steadily the courts are drawing away from a principle which, if it is not altogether wrong, is

limited to only a particular character of dangerous appliances. The following contrivances were held not attractive to children under the circumstances:

Empty cars of a street or steam railroad company standing in open, unfenced yards where children were injured jumping on and off of them. Barney v. Railroad Co., 126 Mo. 372; Catlett v. Railway Co., 57 Ark. 461, 38 Am. St. Rep. 254; Chicago, etc. R. R. v. Stumps, 69 Ill. 409. Nor in such cases is a railroad company bound to keep such cars as to trespassing children in good repair, or the doors shut (Curley v. Railroad Co., 98 Mo. 13); nor to guard them so that such a child cannot be injured by loosening the brakes (Central Branch, etc., R. R. v. Henigh, 23 Kans. 347, 33 Am. Rep. 167; Haesley v. Railroad, 46 Minn. 233, 24 Am. St. Rep. 220, 48 N. W. 1023; Gay v. Railway Co., 159 Mass. 238; O'Connor v. Railroad, 44 La. Ann. 339); nor in leaving a hand car near the track (Robinson v. Railway Co., 7 Utah, 493, 27 Pac. 689); nor to keep a lookout for trespassing children. Cleveland, etc., R. R. v. Adair, 12 Ind. App. 569, 39 N. E. 672; Woodruff v. Railroad, 47 Fed. 689; Chrystal v. Railroad, 105 N. Y. 164; Masser v. Railway Co., 68 Iowa, 602, 27 N. W. 776; Central R. R. v. Rylee, 87 Ga. 491, 13 S. E. 584; Mitchell v. R. R., 132 Pa. St. 226; McDermott v. Railroad, 93 Ky. 408, 20 S. W. 380; Louisville, etc., R. R. v. Williams, 69 Miss. 631, 12 South. 957; Williams v. Railroad, 96 Mo. 275.

Private property of individuals other than railroad companies is even more jealously protected by the courts even from infant trespassers. Thus a boy scalded while playing with scrap lead cannot recover. Mergenthaler v. Kirby, 79 Md. 182, 28 Atl. 1065, 47 Am. St. Rep. 371. So also a child drowned while playing on a defective bridge on private property is without a cause of action. Marnock v. Simpson, 10 Del. Co. (Pa.) 119. So also the owner is not liable for injury to a child playing with a hoisting apparatus situated within his mill. Rodgers v. Lees, 140 Pa. St. 475, 21 Atl. 399, 23 Am. St. Rep. 250, 12 L. R. A. 216. So also an unguarded excavation on the land of a private owner is not such an attractive danger as to impose an extra hazard upon the owner or to make him liable for injuries to child trespassers. Ratte v. Dawson, 50 Minn. 450, 52 N. W. 965; Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Gillespie v. McGowan, 100 Pa. St. 144; Savannah, etc., R. R. v. Beavers, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314. See, however, Fink v. Furnace Co., 10 Mo. App. 61. The same rule applies to ponds, reservoirs, drains, sewers, etc. Stendal v. Boyd, 73 Minn. 53, 75 N. W. 735, 72 Am. St. Rep. 597, 42 L. R. A. 288; Klix v. Nieman, 68 Wis. 271, 60 Am. Rep. 854; Trust Co. v. Grand Rapids, 131 Mich. 571; Rome v. Cheney, 114 Ga. 194, 39 S. E. 933, 55 L. R. A. 221; McCabe v. Woolen Co., 132 Fed. 1006; Peters v. Bowman, 115 Cal. 345; Moran v. Car Co., 134 Mo. 641, 56 Am. St. Rep. 543; Dobbins v. R. R. Co., 91 Tex. 60, 66 Am. St. Rep. 856; Richards v. Connell, 45 Neb. 467, 63 N. W. 915; Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206. This rule is extended also to electric light poles (Simonton v. Light Co., 28 Tex. Civ. App. 374, 67 S. W. 530); stock pens (Gulf, etc., R. R. v. Cunningham, 7 Tex. Civ. App. 65); wagons (Conlon v. Bailey, 58 Ill. App. 261); and stone coping (Clark v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281).

The following cases have applied the doctrine of the Turntable Cases to other contrivances: Cook v. Navigation Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52 (tug-boat); Jensen v. Wetherell, 79 Ill. App. 33 (cog-wheel); Koplekom v. Pipe Co., 16 Colo. App. 274, 64 Pac. 1047, 54 L. R. A. 284 (tubing); Westerfield v. Levis, 43 La. Ann. 63, 9 South. 52 (iron rollers); Whirley v. Whiteman, 1 Head (Tenn.) 610 (shafting); Siddall v. Jansen, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112 (elevator); Kelley v. Parker-Washington Co., 107 Mo. App. 490, 81 S. W. 631 (street scraper); Kansas City, etc., R. R. v. Matson, 68 Kans. 815, 75 Pac. 503 (piles of lumber).

JETSAM AND FLOTSAM.

FACTS ABOUT TILDEN WILL.

In justice to the memory of Charles O'Conor and James C. Carter, the story of their connection with the preparation of the will of Samuel J. Tilden, which has been put in permanent form by the printed report of the New York State Bar Association, recently issued, should not be allowed to stand without correction.

At the last annual meeting, in the course of a paper then read, I criticised the Tilden will as being a badly drawn document. In the discussion which followed, reference was made to the old story, which I had often heard and then believed, that the luckless will of Gov. Tilden was prepared by no less a lawyer than Charles O'Conor, and was submitted by him to James C. Carter for his suggestion and approval as to form before its execution.

After the meeting, Mr. John Brooks Leavitt informed me that Mr. Carter told him that he had taken no part in the preparation of the will and was in no way responsible for its form. This led me to make an investigation. The true story is now told in the letters I have received from John Bigelow, Joseph H. Choate, John Brooks Leavitt, and Edmund L. Laylies, the last named a partner of Mr. Carter for some years prior to his death. With slight variations as to detail and form of expression all agree on the main point—that Mr. Carter took no part in the preparation of the will, never saw it before its execution, and was in no way responsible for its form.

The letters of Messrs. Bigelow and Choate go somewhat further, and reveal a bit of history not heretofore known—viz., that Gov. Tilden was not altogether satisfied that his will was perfectly good in law, and that he intended to assure himself by consulting one of the highest authorities of his time, but neglected to do so.

The Hon. John Bigelow, who, as you know, is one of the executors and was a lifelong friend of Gov. Tilden, writes: "Neither Mr. O'Conor nor Mr. Carter was responsible for the final will of Mr. Tilden, though one or the other would have been had not Mr. Tilden been surprised by death before he had executed his

intention to profit by the counsel of either."

In answer to my suggestion calling Mr. Choate's attention to the fact that his remarks to the members of the State Bar Association, as reported in the published minutes of the last annual meeting, would seem to indicate that he shared the widespread opinion among lawyers that Mr. Carter was in some way responsible for the form of the Tilden will, Mr. Choate writes:

"My extemporaneous remarks at the close of the reading of your paper on 'Safe and Sound Wills,' before the New York State Bar Association, must have been carelessly reported, and the stenographer's report was never submitted to me for correction, so far as I remember, or, if it was, I could not have read it, for I could not let it stand uncorrected.

"Obviously, too, my remarks were carelessly made, and only purported to give the general understanding of the profession on the subject. 'everybody knows, &c.'

"Now that you distinctly challenge my recollection I do clearly remember that Mr. Carter told me in one of our conversations about the will that Gov. Tilden, in one of his visits to Greystone, showed him the will, and he pointed out to the Governor that the indefiniteness in the clause disposing of the estate, which afterward proved fatal to it, might bring it in question; that the Governor replied in effect, 'Well, I will ask you to come up again by and by, and we will put it in proper form,' but that he died without having sent for him as he had intended. He was much given to procrastination.

"As to Mr. O'Conor's part in it I have no personal knowledge. I know how intimate he and Gov. Tilden were, and I have no reason to doubt the correctness of your information about him, but what, if anything, more took place between them will never be known.

"Mr. Bigelow's statement as to Mr. Carter is exactly in acordance with what Mr. Carter told me. I am sorry that my casual remarks, which were evidently unpremeditated, got into print, as they ought not to have done, and have given you so much trouble."

While this correspondence relates mostly to Mr. Carter's non-participation in the preparation of the will, I have been informed on what seems to be good authority that Mr. O'Conor drew an earlier will for Gov. Tilden, which was used in part as a foundation for his last will. This also seems probable, as some portions of it are exceedingly well drawn. In this connection and as bearing on probabilities I note that Mr. O'Conor died at Nantucket, May 12, 1884, only nineteen days after Mr. Tilden's will was executed, and that he is said to have been ill some weeks prior thereto.

Whether the fatal wording of the will was due to Gov. Tilden's lack of special knowledge of the subject or to the unfortunate advice of some other person less familiar with testamentary writing will probably never be definitely known. DANIEL S. REMSEN.

New York, Oct. 15, 1908.

JURIES AND THE UNWRITTEN LAW.

A most remarkable instance of the force of the unwritten law as a defense was brought out recently in the trial of J. B. Hubble, at Beloit, Kansas.

Mr. Hubble was charged with assaulting Ed Green, 24 years old, a suitor of Orpha Hubble, the defendant's daughter, on the evening of July 18. Green was carved up to a fancy degree. Mr. Hubble came to Beloit the same evening to get his daughter, and upon going to the Sloan residence, east of town, where she was visiting, found her in company with Green. The defense was that Mr. Hubble had grounds for feeling that his daughter should not be in Green's com- - - - and due to the trying situation, fearing that Green was about to elope in a buggy with the girl, he was prompted to act as he did.

The surprising feature of the case occurred when Mr. Webster, one of the jury, went to Judge Pickler, stating that he had been delegated by the jury to express certain sentiments to the court. "We want to know if it would be advisable for the jury to add these comments to the verdict," said Mr. Webster. He was informed that would be out of order, so he expressed verbally to the court and to Mr. Hubble and his attorneys that the jury endorsed his actions. "We even maintain that you should either finish the job or prosecute Green in the courts of Rooks County," the juryman told Mr. Hubble.

BOOK REVIEWS.

PROBATE REPORTS ANNOTATED, VOL. 12.

One of the best series of reports which we know anything about is the one which is the subject of review in this annotation. They are carefully selected and edited by Wm. Lawrence Clark, author of Clark on Contracts, etc. These volumes contain about 100 recent cases (in full) with many exhaustive notes, and, in addition to this about fifty pages of sufficiently full memoranda of other recent decisions in digest form. The monographic notes in volume IX cover about one hundred and thirty pages and are practically exhaustive of the cases on the subjects treated. Beginning with Vol. 9, very many of the cases reported in this series are followed by notes referring specifically to the other cases on the same subject and to notes in the preceding volumes of the series. This will enable subscribers to refer to all the cases and notes on the particular subject in hand without taking the time and trouble necessary to carefully examine the indices. In addition to this, another feature which began with Vol. X, and which will be continued and improvd upon in subsequent volumes; namely, a digest of the decisions of general application on questions of probate law and practice, other than those reported in full, and which could be found by the practitioner only after a more or less laborious search through the late digest and reports. For judges and practitioners in probate, surrogate, and other courts in every state, these volumes will be indispensable, as presenting in its latest phases the most important points of probate law, and as giving each year, either in full or in a condensed form, practically all of the recent decisions of general application and value.

Printed in one volume of about 800 pages, and published by Baker, Voorhis & Co., New York.

HUMOR OF THE LAW.

Judge John H. Dillard, a justice of the Supreme Court of North Carolina at one time, is an example of personal independence. Judge John Kerr seeing Judge Dillard in a second-class car, called out:

'How comes it a man of your cloth is caught in a second-class car?'

"Because there is no third-class."

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Alteration of Instruments**—Filling Blanks.—Where a blank for the place of payment of a negotiable note was filled after delivery as authorized by Code Supp. 1907, sec. 3060-a14, filling such blank did not constitute a material alteration within sections 3060-a124 and 3060-a125.—Johnston v. Hoover, Iowa, 117 N. W. Rep. 277.

2. **Animals**—Contributory Negligence of Owner.—In an action for the drowning of plaintiff's cow which strayed and fell into an unguarded hole in the ice of a lake where defendants had been cutting ice, plaintiff held chargeable with contributory negligence.—Richards v. Waltz, Mich., 117 N. W. Rep. 193.

3.——Diseased Cows.—The public authorities have the same right to require destruction of cows having tuberculosis without compensation and without judicial inquiry as they have to require the destruction of decayed meats and vegetables.—City of New Orleans v. Charouleau, La., 46 So. Rep. 911.

4.——Evidence of Viciousness.—One suing for personal injuries inflicted by a domestic animal must show that the owner had knowledge of the vicious propensity of the animal prior to the time of the injuries.—Thornton v. Layle, Ky., 111 S. W. Rep. 279.

5. **Appeal and Error**—Common Joinder in Error.—The common joinder in error is an admission that what is returned as the record of the judgment below is true, and after joinder neither party can of right allege diminution or have a certiorari.—Tomlinson v. Armour & Co., N. J., 70 Atl. Rep. 314.

6.——Estoppel to Question Judgment.—Where one has secured an order purging him of contempt and discharging him from an attachment on conditions to be performed by him, he cannot after accepting the benefit of the order attack by appeal one or more of the conditions imposed.—Krauss v. Krauss, N. J., 70 Atl. Rep. 305.

7.——Liability Insurance.—An order setting aside a default judgment on defendant's cross-complaint must be affirmed, unless it affirmatively appears that there were no grounds on which the order could have been properly made.—Wood v. Johnston, Cal., 96 Pac. Rep. 508.

8.——Plea of Privilege.—Where a claim of privilege to be sued in the county of defendant's residence was raised by plea involving an issue of fact, the denial thereof could not be reviewed in the absence of a statement of facts or a finding by the court in the record.—Lumpkin v. Blewitt, Tex., 111 S. W. Rep. 1072.

9.——Prior Appeals.—Where, on a former appeal, a contention has been passed upon, and on subsequent appeal there is no material difference in the record, and the same arguments are used to sustain the contention as on the former appeal, the contention is not an open one.—Anderson Carriage Co. v. Pungs, Mich., 117 N. W. Rep. 162.

10.——Who May Appeal.—The striking of a party defendant on appeal in intermediate court against whom a judgment was rendered in a justice's court discharges such defendant from any liability so that he cannot appeal therefrom.—Hanie v. Taylor, Ga., 61 S. E. Rep. 1054.

11. **Arbitration and Award**—Agreement to Arbitrate.—An agreement to arbitrate future damage to land held not invalid because concluding the owner against further claim for damages from a private nuisance.—Tennessee Coal, Iron & R. Co. v. Roussell, Ala., 46 So. Rep. 866.

12. **Arrest**—Relief of Persons Imprisoned.—Gen. St. 1895, p. 1726, for the relief of persons imprisoned on civil process, is not a general insolvency act in conflict with the national bankruptcy law.—Maroney v. La Barre, N. J., 70 Atl. Rep. 156.

13. **Bailment**—Negligence.—In an action for injuries to plaintiff's carriage, which he had sent to defendant's shop to be repaired, defendant held not negligent in temporarily placing the carriage in the street in front of its warehouse preparatory to taking it to the repair shop.—Studebaker Bros. Mfg. Co. v. Carter, Tex., 111 S. W. Rep. 1086.

14. **Bankruptcy**—Assignment.—An assignment of so much of a bankrupt's interest in certain land which his ancestor had contracted to sell as was necessary to satisfy creditors held not void as a general assignment, under Bankr. Act, sec. 3, c. 541.—Fidelity Trust Co. v. Kline, N. J., 70 Atl. Rep. 151.

15.——Attachments.—Under Bankr. Act, sec. 67f, c. 541, where creditors of an insolvent, within four months before a voluntary petition in bankruptcy, attached property that had been sold by him by a void sale, held, that the attachment lien would be preserved for the benefit of the bankrupt's estate, and the trustee became subrogated to all the rights of the attaching creditors thereunder.—Love v. Hill, Okl., 96 Pac. Rep. 623.

16.——Involuntary Proceedings.—In involuntary bankrupt proceedings, the failure of the petition to allege that the bankrupt was such a corporation as could be declared an involuntary bankrupt held amendable so as to deprive the court of jurisdiction.—McAfee v. Arnold & Mathis, Ala., 46 So. Rep. 870.

17.——Priority of Judgment Creditors.—Under Bankr. Act, c. 541, sec. 67, 32 Stat., 564, held the bankrupt had no interest superior to lien of judgments obtained more than four months prior to petition in bankruptcy.—Meirkord v. Helming, Iowa, 116 N. W. Rep. 785.

18. **Banks and Banking**—Payment of Forged Check.—Where, without consideration, a bank receives from a money lender money to be delivered to one of his customers on a check drawn by such customer, and pays the money on the check received in due course, that such check is a forgery will not render the bank liable for the amount of the same.—People's Nat. Bank of Kingfisher v. Wheeler, Okl., 96 Pac. Rep. 619.

19. **Benefit Societies**—Beneficiaries.—The widow and children of insured held entitled to the proceeds of a benefit certificate, though the insurance assessments were paid by another with the understanding that the person named in the certificate was a lawful beneficiary.—Knights of Columbus v. McInerney, Mich., 117 N. W. Rep. 166.

20. **Bills and Notes**—Bonafide Holders.—A transferee who takes collateral by way of substitution for other collateral surrendered becomes a holder for valuable consideration.—Voss v. Chamberlain, Iowa, 117 N. W. Rep. 269.

21.——Collateral Security.—In Missouri, where a negotiable note is transferred by the payee as collateral security for another note, and the transferee brings suit thereon against the maker, there can be no setoff or counterclaim or other defense to the note that does not arise out of the note itself or inhere therein.—Powers v. Woolfolk, Mo., 111 S. W. Rep. 1187.

22.——Holder for Value.—Bad faith must be brought home to the holder for value of a negotiable note whose rights accrued before maturity to defeat his recovery on the note on the ground of fraud.—Rice v. Barrington, N. J., 70 Atl. Rep. 169.

23. **Carriers**—Assault on Passenger.—A carrier held not responsible for an assault committed by a car greaser on a passenger who had become a trespasser, in ejecting him from the car, unless the greaser's act was done in assisting the conductor, at his express or implied request.—Mills v. Seattle, R. & S. Ry. Co., Wash., 96 Pac. Rep. 520.

24.——Care in Transporting Live Stock.—A carrier is required to use the highest degree of care for the protection of a car load of stock which for its own convenience it sets out on a sidetrack, and leaves for several hours exposed to cold.—Colsch v. Chicago, M. & St. P. Ry. Co., Iowa, 117 N. W. Rep. 281.

25. **Certiorari**—Persons Entitled.—The ruling that certiorari will not issue at the demand of one not a party to the proceeding in which the judgment sought to be reviewed was entered held not to prevent an individual citizen to invoke the remedy in a matter affecting the public generally.—Hemmer v. Bonson, Iowa, 117 N. W. Rep. 257.

26. **Compromise and Settlement**—Requisites.—Where an officer of a city was illegally removed without proceedings therefor, and a successor appointed, his acceptance of salary due up to the time of the attempted removal did not consitute a final settlement.—Gracey v. City of St. Louis, Mo., 111 S. W. Rep. 1159.

27. **Constitutional Law**—Obligation of Contracts.—The increase of capital stock beyond the limit provided by special charter against the objection of a shareholder held to impair the obligation of a contract so as to be prohibited by the United States Constitution.—Einstein v. Raritan Woolen Mills, N. J., 70 Atl. Rep. 295.

28. ——Right of State to Take Charge of Minor.—It is not an infringement on Const. art. 1, § 13, providing that no person shall be deprived of his liberty without due process of law, for the state to take charge of a minor for the purpose of protecting, educating, and training him.—Ex parte Sharp, Idaho, 96 Pac. Rep. 563.

29. **Contracts**—Implied Warranties.—Where a manufacturer contracts to supply an article of his own manufacture for a particular purpose, and the buyer trusts to the judgment of the manufacturer, there is an implied warranty that the article shall be fit for the purpose.—Conkling v. Standard Oil Co., Iowa, 116 N. W. Rep. 822.

30.——Corporations.—In an action against a corporation for services, plaintiff held not precluded from recovering by the fact that the services were contracted for and a salary paid by another corporation.—Ruttle v. What Cheer Coal Min. Co., Mich., 117 N. W. Rep. 168.

31. **Courts**—Jurisdiction.—Where defendant in a set-off claimed more than $300, but confessed plaintiff's claim and only demanded judgment for the balance, which was less than $300, the district court had jurisdiction.—Bowler v. Osborne, N. J., 70 Atl. Rep. 149.

32.——Void Ordinances.—The decision of the Court of Criminal Appeals that a city cannot enact a valid ordinance punishing offenses punishable under a general law of the state will be followed by the Court of Civil Appeals.—Robinson v. City of Galveston, Tex., 111 S. W. Rep. 1076.

33. **Covenants**—Estoppel.—A landowner entitled to enforce a building line restriction was not chargeable with abandonment by his failure to enforce previous violations in which he had no personal interest.—Brigham v. H. G. Mulock Co., N. J., 70 Atl. Rep. 185.

34. **Criminal Law**—Venue.—It is not necessary to prove venue that some witness should testify directly that the crime was committed in a designated place, but it is sufficient if evidence incidentally given on the trial shows that the venue was properly laid.—State v. Gilluly, Wash., 96 Pac. Rep. 512.

35. **Criminal Trial**—Instructions.—A conviction of murder will be set aside where the court in its charge submitted two conflicting measures of proof to the jury, one of which was erroneous.—Commonwealth v. Deitrick, Pa., 70 Atl. Rep. 275.

36.——Sufficiency of Proof.—The sufficiency of proof of an accused's complicity, as a predicate for admitting acts and declarations of an alleged confederate, held primarily for the presiding judge; but, if its sufficiency is an issue, it should be submitted to the jury.—Richards v. State, Tex., 110 S. W. Rep. 432.

37. **Damages**—Compensation for Loss of Property.—One struck by a street car negligently operated, who was in no manner responsible for the collision, may recover for the loss of money and jewelry caused by the collision.—Hof v. St. Louis Transit Co., Mo., 111 S. W. Rep. 1166.

38.——Excessive Damages.—Where, in a collision of plaintiff's train with another, plaintiff lost one foot and slightly injured one hand, a verdict for $25,000 was so excessive as to indicate the jury was influenced by some improper motive.—International & G. N. R. Co. v. Brice, Tex. 111 S. W. Rep. 1094.

39.——Personal Injuries.—Where a servant in-

jured by the master's machine had never before been employed, and had acquired no status as a wage earner, held, that it could not be said as a matter of law that the loss of part of two fingers of the right hand would not affect his ability to earn money.—Clemens v. Gem Fibre Package Co., Mich., 117 N. W. Rep. 187.

40. **Death**—Damages.—Where substantial pecuniary injury to next of kin appears in the evidence, there was no error in refusing to nonsuit or to charge that nominal damages only could be recovered.—Polo v. Palisades Const. Co., N. J., 70 Atl. Rep. 161.

41.——Parties.—Under Ky. St. 1903, §§ 4, 3690, and Civ. Code Prac. § 18, the widow of the one shot and killed by a town marshal held not required to join the town or the commonwealth as plaintiff in a suit against the marshal and his bondsmen.—Bolton v. Ayers, Ky., 110 S. W. Rep. 385.

42.——Presumptions as to Survivorship.—There is no presumption of survivorship as to persons who perish in a common disaster, and the party asserting survivorship has the burden of proving it.—Alevy v. Missouri Pac. Ry. Co., Mo., 111 S. W. Rep. 102.

43. **Deeds**—Delivery.—A deed placed in the hands of a third person for delivery to the grantee held to pass title to the grantee at the time of the delivery of the deed to him, notwithstanding the grantor's death.—De Bow v. Wollenberg, Or., 96 Pac. Rep. 536.

44. **Descent and Distribution**—Laches.—A wife who does not assert her rights in the property of her husband until after his death, though living apart from him, but does assert such right immediately after the death of such husband held not guilty of laches.—Hilton v. Stewart, Idaho, 96 Pac. Rep. 579.

45.——Personal Property.—The title to personalty of an intestate is in the administrator, and, until proper ascertainment of a surplus after paying debts and costs of administration, an heir is not entitled to any part of it.—People's Sav. Bank v. Hoppe, Mo., 111 S. W. Rep. 1190.

46. **Dismissal and Nonsuit**—Jurisdiction.—Only courts of equity can dismiss cases without prejudice; action at law being only subject to dismissal by voluntary nonsuit before submission, under Shannon's Code, § 4691.—B. E. Dodd & Son v. Nashville, C. & St. L. Ry. Co., Tenn., 110 S. W. Rep. 588.

47. **Divorce**—Condonation.—The law does not enforce condonation nor require a wife who declines to live with her husband who has been guilty of matrimonial offenses to be deemed guilty of desertion.—Bovaird v. Bovaird, Kan., 96 Pac. Rep. 666.

48.——Desertion.—A wife who refused, without cause, to live in the home provided for by the husband, has the burden, when sued by the husband for divorce, to show that she changed her attitude, and notified the husband of her willingness to return.—Purnell v. Purnell, N. J., 70 Atl. Rep. 187.

49.——Evidence.—In a suit by a husband for divorce on the ground of desertion, evidence held not to require the husband to make concessions with a view of terminating the separation caused by the wife willfully and obstinately remaining away from the home which he had provided.—Purnell v. Purnell, N. J., 70 Atl. Rep. 187.

50. **Domicile**—Evidence.—In the absence of proof that a person otherwise qualified has acquired a residence elsewhere, he must be considered to be a resident of the parish where his work requires him to stay, and where he has always lived and voted.—Estopinal v. Michel, La., 46 So. Rep. 907.

51. **Dower**—Property Subject to Dower.—Where a husband who had a contract for the purchase of real estate agreed to convey a part thereof to a third person and then received the legal title, the title was subject to the third person's right, which right was superior to the dower right of the wife.—Inglis v. Fohey, Wis., 116 N. W. Rep. 857.

52. **Elections**—Qualification of Voter.—The object of requiring a voter to have resided for a certain time at the place where he offers to vote is that he may have an opportunity to acquire the necessary information to vote intelligently, and to prevent colonization.—Estopinal v. Michel, La., 46 So. Rep 907.

53. **Estoppel**—Clothing Another With Apparent Title.—To estop an owner of personal property from asserting his title against one who has dealt with the person in possession on the faith of his apparent ownership, something more than mere possession and control must be shown.—Kiewel v. Tanner, Minn., 117 N. W. Rep. 231.

54. **Evidence**—Admissions.—In an action against a railroad company for negligence resulting the death of an employee, letters by defendant's chief surgeon held admissible; the doctrine of res gestae having no application.—Phillips v. St. Louis & S. F. R. Co., Mo., 111 S. W. Rep. 109.

55.——Personal Injuries.—In an action for personal injuries from an assault and from the bites of a dog, expert testimony showing the possibility of hydrophobia was improperly admitted where there were no symptoms of hydrophobia, and the dog did not have the disease.—Bernadsky v. Erie R. Co., N. J., 70 Atl. Rep. 189.

56.——Qualifications of Expert.—Where defendant company's superintendent and secretary testified that a witness had been hired by defendant to take charge of certain machines, defendant cannot contend that he was not qualified to testify as an expert in regard to the machines.—Clemens v. Gem Fibre Package Co., Mich., 117 N. W. Rep. 187.

57.——Telephone Conversations.—A conversation by telephone is admissible in evidence, when from all the circumstances the identity of the party answering the telephone is established with reasonable certainty.—Barrett v. Magner, Minn., 117 N. W. Rep. 245.

58.——Telephone Conversations.—A telephone conversation may be repeated in evidence where such conversation is otherwise admissible, though the witness did not identify positively the person with whom he had the conversation.—Conkling v. Standard Oil Co., Iowa, 116 N. W. Rep. 822.

59. **Executors and Administrators**—Effects of Ancillary Appointment.—Where a person is appointed as executor in Utah, and afterwards appointed administrator with will annexed in Idaho, he represents said estate in both jurisdictions.—Hilton v. Stewart, Idaho, 96 Pac. Rep. 579.

60.——Findings of Trial Court.—A finding and order of the trial court that an executrix appeared to resist a claim against the estate held

a matter peculiarly within the knowledge of the trial court, and not reviewable on appeal.—Wise v. Outtrim, Iowa, 117 N. W. Rep. 264.

61.——Mortgages.—An executor held to have no power to pay mortgages, in the absence of authority in the will.—Draper v. Brown, Mich., 117 N. W. Rep. 213.

62. **Fences**—Destruction.—In a prosecution for unlawfully pulling down the fence of G., if defendant instructed the subordinates to pull down S.'s fence, but they pulled down G.'s fence instead by mistake, defendant cannot be convicted.—Gordon v. State, Tex., 110 S. W. Rep. 146.

63. **Food**—Liabilities of Manufacturer.—A manufacturer of canned goods held under the duty to the one who, in the ordinary course of trade becomes the ultimate purchaser, to exercise care that the goods used are fit for food and not tainted with poison.—Tomlinson v. Armour & Co., N. J., 70 Atl. Rep. 314.

64. **Frauds, Statute of**—Agency to Sell Land.—A contract employing an agent to find a purchaser for lands is not within the statute of frauds; though authority to convey can be given by deed only.—Kempner v. Gans, Ark., 111 S. W. Rep. 1123.

65.——Availability as Defense.—Where a promise to give a real estate mortgage is not in writing, equity cannot, on failure to execute the mortgage, declare the existence of an equitable mortgage, at least in the absence of such part performance as will take the case out of the statute of frauds.—Edwards v. Scruggs, Ala., 46 So. Rep. 850.

66.——Contract to Convey Land.—An oral contract for the sale of land held performed in part, so far as a strip in controversy was concerned, so that the vendor could not repudiate the same because of the statute of frauds.—Starrett v. Boynton, N. J., 70 Atl. Rep. 183.

67. **Fraudulent Conveyances** — Gifts.—An agent through whom a gift is being effectuated cannot, after title has vested in him for that purpose, have the gift declared void, where the effect would be to enable him to keep the property for himself.—Sullivan v. Fant, Tex., 110 S. W. Rep. 507.

68. **Garnishment**—Nature of Remedy.—In equitable garnishment, as in legal process having a similar object in view, nothing more can be accomplished against the debtor of defendant than in a direct suit against the former by the latter.—People's Sav. Bank v. Hoppe, Mo., 111 S. W. Rep. 1190.

69. **Homestead** — Abandonment. — A rural homestead may be changed into an urban homestead and, after such change, the portion of the rural homestead which is not within the town, or which is not actually used for homestead purposes, loses its homestead character.—Ayres v. Patton, Tex., 111 S. W. Rep. 1079.

70. **Homicide**—Assault With Intent to Kill.—That defendants' revolvers at the time defendants used them to shoot at a sheriff and his posse would not shoot accurately for the distance between defendants and the sheriff at the time held no objection to a conviction for assault with intent to kill.—Warford v. People, Colo., 96 Pac. Rep. 556.

71.——Dying Declarations.—In a murder trial, the state could not show that shortly after the shooting decedent, on being asked if he did not try to prevent accused from shooting him, stated that he tried to take the gun away from the accused, but the first shot numbed him, so he could not, since the declaration was made in response to a leading and suggestive question.—Lockhart v. State, Tex., 111 S. W. Rep. 1024.

72.——Manslaughter.—In a prosecution for manslaughter, a requested instruction that defendant's house was his castle, and stating his right to defend it against attack, etc., is properly refused where it does not state defendant's belief in the facts hypothesized.—Hill v. State, Ala., 46 So. Rep. 864.

73.——Self Defense.—One authorized to make an arrest held not required to retreat but authorized to repel force with force, so that if a killing unavoidably results the homicide is justifiable.—Birt v. State, Ala., 46 So. Rep. 858.

74. **Husband and Wife**—Action for Alimony.—When a wife separates herself from her husband and claims alimony, she must justify the separation by proof of extreme cruelty of the husband as if she were suing for divorce.—Taylor v. Taylor, N. J., 70 Atl. Rep. 323.

75.——Incompatibility of Temper.—Where incompatibility of temper led to a state of affairs rendering the living together of a husband and wife unbearable, the judgment for plaintiff in a suit by the wife for separation will be affirmed.—Schlater v. Le Blanc, La., 46 So. Rep. 921.

76. **Infants**—Right of State to Custody.—It is not an infringement on any constitutional right of a minor for the state to summarily lay hold of him when deprived of his parents or guardian, and give to him the fostering care, and education due him from his parents or guardian.—Ex parte Sharp, Idaho, 96 Pac. Rep. 563.

77. **Injunction**—Restraining Enforcement of Void Ordinance.—Where the enforcement of a void ordinance regulating plumbers will injure the business of a firm engaged in the plumbing business, injunction will lie to restrain the enforcement of the ordinance.—Robinson v. City of Galveston, Tex., 111 S. W. Rep. 1076.

78. **Interpleader**—Grounds of Relief.—One employing under separate contracts two real estate agents to procure a purchaser of real estate held not entitled to maintain a bill of interpleader to require the two agents to interplead as to which is entitled to commissions for the sale.—Maxwell v. Frazier, Ore., 96 Pac. Rep. 548.

79. **Intoxicating Liquors**—Action on Liquor Dealers' Bond.—In an action on a liquor dealer's bond for permitting a minor to enter and remain in his saloon, it was no defense that plaintiff, the minor's father, had authorized other dealers to sell liquor to the minor.—Markus v. Thompson, Tex., 111 S. W. Rep. 1074.

80.——Petition for License.—A "block" within the meaning of Denver City Charter, sec. 75, requiring the consent of landowners to the issue of a license for the sale of intoxicating liquors, held to mean a square surrounded by streets, though it is divided into separate blocks for the purpose of designating the lots therein.—Slater v. Fire & Police Board of City & County of Denver, Colo., 96 Pac. Rep. 554.

81. **Judicial Sales**—Proceedings to Vacate.—The manner of bringing a grievance to the attention of the court in a proceeding to vacate an order confirming a sale made by order of the court of chancery held of no importance so long as the original parties to the suit and the purchaser have notice and an opportunity to be

heard.—Butters v. Butters, Mich., 117 N. W. Rep. 203.

82. **Judgment**—Res Judicata.—Where no appeal had been taken from an order admitting a will to probate in contested proceedings therefor, when an equity suit passed to a decree refusing to set aside the probate, the probate order was res judicata of all matters which could have been properly determined therein.—In re Brown's Estate, Iowa, 117 N. W. Rep. 260.

83.——What Constitutes.—A judge's memorandum on a trial docket that judgment had been entered for plaintiff held not a judgment upon which an execution could be issued.—Winn v. McCraney, Ala., 46 So. Rep. 854.

84. **Landlord and Tenant**—Surrender of Term.—A surrender of a term by operation of law will not be implied on proof that lessees had dissolved partnership and that an unauthorized person had tendered lessor the key.—Creachen v. Achenberg. N. J., 70 Atl. Rep. 160.

85. **Libel and Slander**—Malice.—On trial of complaining church members for libeling a member charged with wrong doing, the burden is on the latter to prove that the complaint was induced by express malice.—Butterworth v. Todd, N. J., 70 Atl. Rep. 139.

86. **Life Estates**—Reservation.—Where a husband owned certain land subject to his wife's inchoate right of dower, and they conveyed the land, reserving a life estate during their natural lives, the life estate was reserved to the husband individually and not to the wife, nor to the husband and wife jointly.—White v. City of Marion, Iowa, 117 N. W. Rep. 254.

87. **Limitation of Actions**—Accrual of Cause of Action.—Where by the negligent construction of a railway embankment, surface water is discharged on the land of an adjoining proprietor, his cause of action accrues at the date of the injury.—Morse v. Chicago, B. & Q. Ry. Co., Neb., 116 N. W. Rep. 859.

88. **Master and Servant**—Assumed Risks.—If a machine at which a servant was put to work were not in proper condition, the servant would only assume such risks as he knew of or ought to have known of, and the dangerous character of which he ought to have appreciated.—Clemens v. Gem Fibre Packing Co., Mich., 117 N. W. Rep. 187.

89.——Assumed Risks.—Where defendant railroad had promulgated rules by which plaintiff was governed, if plaintiff violated the rules, he assumed the risks incident thereto, and was prima facie guilty of contributory negligence as a matter of law.—International & G. N. R. Co. v. Brice, Tex., 111 S. W. Rep. 1094.

90.——Assumed Risk.—A servant injured by a steel chip from a chisel, while assuming the ordinary risk of the chipping of steel chisels when hammered, did not assume the extraordinary risk of the chipping of a defective steel chisel furnished by defendant.—Manning v. Portland Steel Ship Bldg. Co., Ore., 96 Pac. Rep. 545.

91.——Statutory Provisions.—The removal on Sunday of coal from the sump in the bottom of a shaft in a coal mine held a part of the operation of the mine within Pub. Acts 1905, p. 143, No. 100, sec. 3.—Capeling v. Saginaw Coal Co., Mich., 117 N. W. Rep. 182.

92.——Vice Principal.—Where an employee was intrusted with the discretion as to the time of withdrawing other employees from a sewer excavation before the explosion of a blast, he was the representative of the master, and for any negligence the master was liable.—Polo v. Palisade Const. Co., N. J., 70 Atl. Rep. 161.

93. **Mortgages**—Consideration.—Where defendant purchased certain mortgaged property, agreeing with the owner of the property to clear the title of all incumbrances and to erect a building thereon, and stated such facts to the mortgagee, who agreed in consideration thereof to extend the mortgage, the agreement was based on a sufficient consideration.—Hall v. Parsons, Minn., 117 N. W. Rep. 240.

94.——Failure to Record Deed.—The court held without power to set aside a sale in a chancery foreclosure of mortgage on the ground that the deed was not filed in the office of the register of deeds, as required by Pub. Acts 1899, p. 310, No. 200.—Butters v. Butters, Mich., 117 N. W. Rep. 203.

95.——Foreclosure.—A creditor holding mortgage to secure a loan, which act declares that the mortgage covers a certain per cent. for attorneys' fees in case of suit, must allege and prove circumstances warranting a demand for attorneys' fees.—Succession of Howell, La., 46 So. Rep. 933.

96. **Municipal Corporations**—Leaving Vehicle in Street.—Merely leaving a vehicle unguarded in a city street a reasonable length of time, for a legitimate purpose, would not constitute negligence per se.—Studebaker Bros. Mfg. Co. v. Carter, Tex., 111 S. W. Rep. 1086.

97.——Negligence of Officers.—It was not competent for a commissioner of parks and boulevards to rely wholly on the reports of his engineer and inspectors, or to the same extent that he might, were they appointed by others, and not entirely subject to his own discretion.—Bolger v. Common Council of City of Detroit, Mich., 117 N. W. Rep. 171.

98.——Removal of Employee.—Where a deputy inspector of boilers and elevators in the city of St. Louis was illegally removed, his acceptance of a temporary position as hoisting engineer was not incompatible with his duties as such deputy inspector, and does not prevent his recovery of salary for the balance of his official term.—Gracey v. City of St. Louis, Mo., 111 S. W. Rep. 1159.

99.——Smoke Ordinance.—Where a city charter empowers the adoption of ordinances necessary for the protection of persons and property and preservation of the public health, held sufficient power is given to sustain an ordinance for the suppression of dense smoke from smokestacks.—Atlantic City v. France, N. J., 70 Atl. Rep. 163.

100. **Municipal Corporations**—Use of Streets.—A bicyclist and automobilist using a street crossing as travelers owe each other the duty to use it with a reasonable regard to the rights of the other.—Weber v. Swallow, Wis., 116 N. W. Rep. 844.

101. **New Trial**—Extent.—A second trial in ejectment extends to all questions presented pertinent to the title and right of possession, including damages for use and occupation.—Sammons v. Pike, Minn., 117 N. W. Rep. 244.

102. **Negligence**—Res Ipsa Loquitur.—Where plaintiff's case shows the conditions under which an accident happened and the question is raised whether under the circumstances specified the conduct of defendant was negligent, the rule res ipsa loquitur does not apply.—Dentz v. Pennsylvania R. Co., N. J., 70 Atl. Rep. 164.

103. **Nuisance**—Pleading and Proof.—The operation of a factory so as to constitute a nuisance may be given in evidence under an allegation that it was negligently operated, if the other allegations of fact make out a case of nuisance.—Hinmon v. Sommers Brick Co., N. J., 70 Atl. Rep. 166.

104. **Partnership**—Liabilities to Creditors.—Partnership property is liable to attachment for the debts of a partner in his business, with which the co-partner has no concern, and the rights of the partners may be settled on the co-partner filing an interplea claiming ownership of the goods.—Swofford Bros. Dry Goods Co. v. Diment, Mo., 111 S. W. Rep. 1196.

105. **Partition**—Property Subject.—Where a wife occupies a homestead set apart for her use, and that of the family of her deceased husband, it is not liable to partition at the suit of the assignee of some of the adult heirs.—Funk v. Baker, Okl., 96 Pac. Rep. 608.

106. **Pledges**—Substitution of Collateral.—Where notes pledged as collateral security for another note were surrendered from time to time, on the statement that the makers desired to pay, and new notes were substituted as collateral security, there was no authority to collect the collateral for the creditor.—Powers v. Woolfolk, Mo., 111 S. W. Rep. 1187.

107. **Principal and Agent**—Authority of Agent.— A manufacturer who employs sales agents impliedly authorizes the agents to make representations concerning the quality and fitness of goods which are of such character that the proposed buyer cannot have knowledge of their properties.—Conkling v. Standard Oil Co., Iowa, 116 N. W. Rep. 822.

108. **Railroads**—Frightening Animals.—A railroad company held liable for injuries to the driver of a team resulting from the frightening of the team by steam emitted from an engine at a railroad crossing.—St. Louis Southwestern Ry. Co. of Texas v. Nelson, Tex., 111 S. W. Rep. 1062.

109. **Sales**—Defenses.—Where a merchant directed another to have shipped to him corn of a certain grade over a certain railroad, that the corn while in transit became heated will not excuse the vendee from payment.—Champlin v. Church, N. J., 70 Atl. Rep. 138.

110. **Set-Off and Counter Claims**—When Maintainable.—Plaintiff agreed with defendant not to sue on a note within a certain time, but brought an action before the expiration of the time. Held, that the breach of contract and resulting damages might be interposed as a counterclaim.—Hall v. Parsons, Minn., 117 N. W. Rep. 240.

111. **Specific Performance**—Defenses.—Protest by vendors against retention of a disputed strip of land by vendee not made until two months after the vendee had entered into possession thereof held no defense to a suit for specific performance.—Starrett v. Boynton, N. J., 70 Atl. Rep. 183.

112. **Street Railroads**—Care of Passengers.—Where a street railway loads its cars so as to fill the standing room inside and the footboards outside, care of the passengers' safety must be proportionate to the dangers to which they are exposed.—La Barge v. Union Electric Co., Iowa, 116 N. W. Rep. 816.

113.——Injuries to Property.—Where a street railway company ran its feed wire through the trees of an abutting land owner without permission, if the company was acting under rights granted to it by the public, the grant must be introduced in evidence by the defendant.—Bathgate v. North Jersey St. Ry. Co., N. J., 70 Atl. Rep. 132.

114.——Negligence of Motorneer.—The motorneer of an electric car passing immediately in front of a fire engine house is guilty of double negligence when he drives at full speed in approaching such house, and fails to see in time to avoid collision with an outcoming hose cart a signal given while the car is 144 feet distant from the engine house.—Dole v. New Orleans Ry. & Light Co., La., 46 So. Rep. 929.

115. **Taxation**—Double Taxation.—An occupation tax of a percentage of its gross earnings in a municipality imposed on a telephone company is valid notwithstanding such earnings are made up in part of tolls and rentals over lines located in part beyond the municipal limits.—Nebraska Telephone Co. v. City of Lincoln, Neb., 117 N. W. Rep. 284.

116.——Soldier's Exemptions.—A soldier's life estate in land should be considered in determining whether he has $5,000 worth of property, and is therefore not entitled to a soldier's exemption from taxation under Code Supp. 1902, sec. 1304.—White v. City of Marion, Iowa, 117 N. W. Rep. 254.

117.——Tax Sale.—The original owners of land sold for taxes held not entitled to quiet title to it as against a purchaser from the state, in the absence of an offer to pay the amount for which the land was sold.—Flannigan v. Towle, Cal., 96 Pac. Rep. 507.

118. **Telegraphs and Telephones**—Failure to Deliver Long Distance Call.—Essential to a telephone company's liability for consequential damages caused by its negligent failure to notify one for whom a call is placed that another desires to talk to him, stated.—Southwestern Telegraph & Telephone Co. v. Flood, Tex., 111 S. W. Rep. 1064.

119. **Trial**—Instructions.—Failure in an action for negligence to instruct the jury to find for defendant, if not found guilty of negligence, held not reversible error, in the absence of a special request therefor.—St. Louis Southwestern Ry. Co. of Texas v. Nelson, Tex., 111 S. W. Rep. 1062.

120. **Venue** — Petition. — Where plaintiff brought suit in a county other than that of defendant's residence, and the petition alleged defendant's correct residence and did not show any legal right to sue outside thereof, defendant could have taken advantage of the defect by exception.—Lumpkin v. Blewitt, Tex., 111 S. W. Rep. 1072.

121. **Wills**—Construction.—Where a particular estate is created, with remainder to the children of a designated person, the gift by way of remainder will go, not only to the objects living at the death of testator, but to all who may subsequently come into existence before the period of distribution.—Clark v. Morehous, N. J., 70 Atl. Rep. 307.

122.——Construction as to "Children."—Where testator made a devise over to his "children who shall then be living," the term "children" could not be enlarged to include grandchildren where there was nothing in the context to authorize such enlargement.—Frank v. Frank, Tenn., 111 S. W. Rep. 1119.

123.——Revocation.—That testator after making a will in favor of his wife was divorced held insufficient to constitute an implied revocation of the will at common law.—In re Brown's Estate, Iowa, 117 N. W. Rep. 260.

124.——Undue Influence.—Where a will is made by a patient in favor of his physician to the exclusion of relatives to whom ordinarily his property would go, with no reason appearing why such exclusion should occur, it is presumed on grounds of public policy that the will is void.—Hitt v. Terry, Miss., 46 So. Rep. 829.

125. **Witnesses**—Bias.—In a prosecution for forgery of an order for witness' fees, evidence that the prosecuting witness was an intimate friend of a person whom accused had unsuccessfully defended for a crime was inadmissible to show the witness' animosity towards accused.—State v. Gilluly, Wash., 96 Pac. Rep. 512.